

ONHWP and The Publication Issue

Many builders of new homes in the Province of Ontario run into problems dealing with the Ontario New Home Warranty Program (“ONHWP”) at the date of closing of a new home they have constructed.

Prior to the closing date ONHWP is supposed to have supplied to the builder a Certificate of Completion and Possession (CCP) so that it can be provided to the purchaser’s solicitor.

This document contains an enrollment number confirming the enrollment of the home in the Plan. It also confirms the builder’s registration number, which information is used by the purchaser’s lender to provide proof of registration which in turn ensures mortgage funds will be released on closing.

Without the production of the CCP, many lenders and their insurers will not permit the advancement of mortgage funds to prospective owners on closing. Therefore the sale cannot occur and both the owner and builder are put in an extremely difficult position.

It does not matter why the Program does not provide the CCP. Whether there is an outstanding dispute between the builder and the Program regarding terms and conditions of registration or whether ONHWP is asserting that the builder is not registered or owes money on outstanding invoices, the refusal to provide the CCP can prevent the deal from closing.

In other words, ONHWP may use the leverage of withholding the CCP to oblige the builder to comply with terms and conditions of registration that may be in dispute.

If the builder is unable to produce the CCP on closing it jeopardizes the closing and it can be argued that the builder is in breach of contract.

Because the builder cannot close, he does not obtain the closing funds, the homeowner is without a home and the Warranty Program may be exposed to deposit refund claims from the owner or a lawsuit from the builder or owner for jeopardizing the closing.

In this scenario there is no benefit to either the owner or the builder by ONHWP withholding the CCP.

The above situation is all too familiar to many builders and to numerous owners. In my view it is completely unnecessary. The CCP is not a document that is required as a matter of law to close the transaction and has nothing to do with whether or not the warranty attaches to the new home!

The warranties attach to the home when title passes, irrespective of whether or not the builder is registered with ONHWP.

Recently I had occasion to deal with a situation where ONHWP questioned whether the builder was or was not appropriately registered with the Plan. For that reason it would not forward CCPs to the builder and sales transactions could not close.

At first the financial institution and CMHC would not advance the funds. However, after several discussions with them and with solicitors for both the owner and the builder, the financial

institution finally accepted that there was a warranty that attaches, that good and marketable title would pass, whether or not the builder was registered and whether or not it received a CCP. The financial institution then released the mortgage funds and the deals closed.

Representatives of the Warranty Program confirmed that while they would not provide the CCP, and while they knew this jeopardized the closing, they conceded that the CCP was not required to either pass title or to provide the warranty coverage! Builders should be aware that a CCP is not a document that goes to title and is not required for the warranty to apply to their homes!

In my opinion ONHWP should never interfere with the closing of real estate transactions by withholding the CCP, thereby jeopardizing closings and leaving builders and owners out in the cold. There appears to be no good reason why ONHWP should not supply the CCP and permit the closing because there is coverage for every new home, whether or not enrolled and whether or not the builder is registered.

Under the provisions of the *Ontario New Home Warranty Plan Act* (the “Act”) if a builder does not resolve construction deficiency complaints made by a home owner, the Ontario New Home Warranty Program (“ONHWP”) will carry out a warranty assessment and render a decision as to warranted and non warranted items.

Builders are placed at a disadvantage when ONHWP makes decisions where there are findings of breaches of warranty .

Where the builder does not resolve or repair the deficiencies within a specified time period, either because the builder disagrees or cannot get access or there is a dispute about the extent of the repairs, then ONHWP will move to settle the “claim” possibly by way of cash settlement and invoice the builder the amount of the cash settlement plus a 15% administration fee, plus GST.

As soon as ONHWP has made payment to the owner it will publish on its website that there is a “debt” owing by the builder indicating the amount of money the Warranty Program has paid and that the builder was either **unable or unwilling** to undertake its warranty obligations.

It will also notify Equifax who will publish the existence of such debt which in turn will affect the ability of the builder to obtain credit in the future.

In addition, whether or not the builder repairs the breaches of warranty, the conciliation will be deemed a chargeable conciliation which will also appear on ONHWP’s website.

Currently a builder who disagrees with a decision by the Program that there are breaches of warranty, has no remedy, under the legislation.

Under these circumstances the builder cannot challenge the decision of the Warranty Program regarding the breach of warranty before the Program pays money and effects publication.

The builder is in effect judged before he can defend himself. The builder does not have the right to appeal the conciliation decision to the License Appeal Tribunal.

The new Builders Arbitration Forum which allows builders to appeal adverse breach of warranty decisions to an arbitrator is not only costly and cumbersome, but will not prevent ONHWP from making the initial breach of warranty decision, invoicing the builder and notifying Equifax. Nothing remains in abeyance during this expensive new arbitration process.

I believe there exists a remedy for builders who disagree with warranty decisions. The builder can immediately seek an order from the court (by way of injunction) staying the impact of all of these decisions, pending determination of the validity of the breaches warranty either through the Builders Arbitration Forum, the License Appeal Tribunal or the Court.

Rather than allowing ONHWP to unilaterally change the financial status and credit position of the builder and publishing the existence of a “debt” and a “chargeable” conciliation on the ONHWP website, the builder can seek a stay of any decisions of ONHWP pending the dispute being resolved in the normal course. This, in turn will negate the immediate impact of the Program’s warranty decision which can severely damage the builder while the builder waits for the legal process to decide whether or not he is at fault.

There have been a number of recent cases between builders and the Warranty Program wherein builders have resisted this practice of the Warranty Program rendering unilateral decisions with respect to breach of warranty, cash settling with the homeowner and publishing the existence of the debt on its website and with Equifax.

In these cases, builders have brought actions against the Warranty Program and sought injunctions to prevent the Program from cash settling with the owners and to prevent the Warranty Program from publishing the “debt” on its website or notifying Equifax.

In two instances the Court determined that the Program could not communicate with Equifax without placing a caveat that there was a serious issue to be tried as far as the Court was concerned regarding the alleged “debt”; another case confirmed that a cash settlement should not occur until a determination as to whether or not there was a breach of warranty had been determined.

In yet another case because the builder was not able to prove irreparable harm, although there was a serious issue to be tried as far as breach of warranty was concerned; the publication of the “debt” was allowed to occur.

It appears from these cases that builders are in a position to challenge the Program’s warranty decisions before adverse publication or payment by ONHWP, by seeking injunctive relief which prevents payment and publication until a Court has determined whether there has been a valid breach of warranty.

Because there is no right of appeal to the License Appeal Tribunal for breaches of warranty claims, the remedy of the injunction is extremely important. The injunction will meaningfully protect the builder, its credit position and its reputation until the disagreement with ONHWP’s decision is settled.

On a cautionary note the facts must show significant harm to the builder if payment is made by ONHWP or publication occurs, and only in such circumstances will the Court determine that because there is a serious issue to be tried with respect to breach of warranty such as lack of access or the existence of complex construction issues, that a temporary injunction is appropriate.

It is unlikely that the Court will grant an injunction every time a builder disagrees with an ONHWP warranty assessment. There must be good reason to disagree and there must be evidence of harm to the builder.

ONHWP's position is that once it has rendered a warranty decision it can publish what it likes and pay what it likes to the homeowner, and the builder has no remedy but to wait for the Program to propose to revoke its registration at which time the builder can appeal and defend its position. However by this time, the "debt" has been paid, publication has occurred and the damage to the builder has been done. Even if the builder vindicates himself the adverse publicity has not been avoided and the Program has no obligation to remove the adverse publication from its website.

By way of conclusion builders should be alert to the fact that although the Program can render a breach of warranties decision upon conciliation inspection, this does not preclude the right of the builder to challenge those decisions to prevent the Program from paying the owner and publishing the existence of the debt before liability has been determined by a Court of law.

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